

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

THERANOS, INC., et al,)	Case No.: C 11-5236 PSG
)	
Plaintiffs,)	ORDER RE: SECURITY MEASURES
v.)	FOR CERTAIN DISCOVERY
)	
FUISZ TECHNOLOGIES, LTD., et al,)	(Re: Docket Nos. 124, 125)
)	
Defendants.)	
)	
)	

Defendants Fuisz Technologies, Ltd., et al (“Fuisz”) submitted a letter brief to resolve a discovery procedure dispute between the parties regarding how Plaintiffs Theranos, Inc., et al, (“Theranos”) must produce confidential information.¹ Theranos wants to produce certain exceptionally confidential documents subject to heightened security protocols.² Fuisz objects that the increased measures exceed the protective order Theranos itself drafted and that the measures

¹ See Docket No. 124.

² See Docket No. 125.

1 prejudice Fuisz.³ Fuisz also believes that Theranos has not satisfied its discovery obligations and is
 2 using the security dispute to avoid completing production.⁴

3 Theranos describes the documents at issue as “contain[ing] information regarding
 4 revolutionary future Theranos products and avenues of research” and as “so sensitive, that if they
 5 were to be leaked, even inadvertently, to those not authorized to see the documents, Theranos risks
 6 suffering substantial and irreparable competitive harm.”⁵ Theranos concedes that the documents
 7 do not contain source code but asserts that “the potential harm that Theranos would suffer as a
 8 result of these documents being leaked is the same as that a software company would suffer if its
 9 source code were leaked.”⁶ The company offers as a solution to produce to Fuisz’s counsel and its
 10 experts the documents on a CD with a code that prevents any reproduction of the documents,
 11 including printing hard copies.⁷

12 Fuisz opposes such a restriction because it believes the inability to create paper copies
 13 would prevent it from attaching copies – presumably under seal – to motion papers or to provide
 14 copies to experts or to deponents.⁸ Theranos indicated in its letter that it was willing to give the
 15 CDs to Fuisz's experts, to provide paper copies at depositions, and to work with Fuisz to provide
 16 paper copies for motion practice.⁹ Fuisz counters that having to confer with Theranos to obtain
 17 paper copies before depositions and motion practice would require it to reveal work product
 18
 19
 20

21
 22 ³ See Docket Nos. 124, 127.

23 ⁴ See Docket No. 127.

24 ⁵ Docket No. 125.

25 ⁶ *Id.*

26 ⁷ See *id.*

27 ⁸ See Docket No. 127.

28 ⁹ See Docket No. 125.

1 information.¹⁰ Fuisz further argues that regardless of the offers, Theranos is requiring measures
2 beyond the protective order without seeking to modify the protective order and that its actions
3 really just disguise whether it has satisfied its discovery obligations.¹¹

4 Theranos' concerns regarding having to produce highly confidential information are not
5 unwarranted, but that is why Fed. R. Civ. P. 26(c) allows for protective orders and why the court
6 has approved a protective order for the information produced in this case.¹² Theranos cannot
7 unilaterally object to producing the information absent extra security concessions from Fuisz. It
8 agreed to the protective order to address these concerns.¹³ Theranos notably has not asked for a
9 modification of the protective order. To the extent that its opposition to Fuisz's brief can be
10 interpreted as a request for an extra protective order for this limited information, Theranos has not
11 made a sufficient showing why the current protections are insufficient. Although the allegations in
12 this case involve an accusation of misappropriation, Theranos has not yet established liability and
13 more importantly Fuisz's counsel has committed to not providing any of the information to the
14 client absent permission from Theranos.¹⁴ The court also notes that absent a clear definition of the
15 information that would be subject to this heightened security measure, it cannot articulate a specific
16 protective order that does not amount essentially to modifying the blanket protective order with a
17 third confidentiality designation.
18

19
20 As to Fuisz's concerns about whether Theranos' production is deficient, the court advises
21 Fuisz to bring a motion to compel, in letter brief form, if it believes that Theranos has failed to
22 produce certain categories of information. But it reminds the parties that before any discovery
23

24 ¹⁰ See Docket No. 127.

25 ¹¹ See *id.*

26 ¹² See Docket Nos. 78, 79.

27 ¹³ See Docket No. 78.

28 ¹⁴ See Docket No. 127.

1 motion practice, they must meet and confer in person or by telephone. Email is insufficient under
2 the Civil Local Rules.¹⁵

3 Theranos shall produce the confidential documents pursuant to the protective order already
4 in place in this case no later than seven days from this order.

5 **IT IS SO ORDERED.**

6 Dated: April 5, 2013

7 
8 PAUL S. GREWAL
9 United States Magistrate Judge

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
United States District Court
For the Northern District of California

¹⁵ See Civil L.R. 1-5(n).